No. 09-1407

Supreme Court, U.S.
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In The
Supreme Court of the United States

CURTIS JONES,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Pennsylvania Supreme Court should have reviewed *de novo* a magistrate's decision to approve a search warrant, an issue not decided by or presented to that Court?

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OPINIONS BELOW

The opinion of the Pennsylvania Supreme Court (Pet. App. 1a-22a) is reported at 988 A.2d 649. The opinion of the Pennsylvania Superior Court (Pet. App. 23a-46a) is published at 928 A.2d 1054. The post-trial opinion of the trial court is not published or included in the petition. The trial court's order (Pet. App. 62a-68a) is not published.

STATEMENT OF JURISDICTION

The Pennsylvania Supreme Court entered judgment on February 16, 2010. The petition for a writ of certiorari was filed on May 17, 2010 and docketed on May 19, 2010. The petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1257.

COUNTERSTATEMENT OF THE CASE

Following a jury trial in the Delaware County Court of Common Pleas, the petitioner was convicted of First-Degree Murder in violation of 18 Pa.C.S. §2502 and Robbery in violation of 18 Pa.C.S. §3701. The trial court sentenced the petitioner to life without parole for First-Degree Murder, and a consecutive term of 66 months to 132 months for Robbery. Pet. 3-4; Pet. App. 49a.

The Pennsylvania Superior Court reversed the judgment of sentence and ordered a new trial. Pet.

App. 61a. The Pennsylvania Supreme Court granted the Commonwealth's petition for allowance of appeal, reversed the Superior Court and reinstated the judgment of sentence. Pet. App. 9a-10a, 21a.

* * *

Very early on April 15, 2002, Chester City police officers responded to a report of gunfire near the Widener University campus. The police soon found the victim's dead body, wounded by five gunshots, lying in the street. The police found a set of keys in the victim's clothing that suggested the victim was a Widener student. University security gave police a photograph that appeared to be the victim, Abdul Sesay, a 20-year-old student. The petitioner was the victim's roommate in a university dormitory. Pet. App. 2a-3a.

Later that day, a magisterial district judge issued a search warrant for the dormitory room. The affidavit of probable cause, as reproduced in the Pennsylvania Supreme Court's opinion, stated:

> On 2/19/2001[FN1] Officer Gizzi responded to the area of the 100[0] blk of East 18th St. for a call of shots fired. Upon arrival the officer was advised by witnesses that the shots were coming from the end of the street[.] Officer Gizzi then went to the end of the [s]treet and discovered a B/M wearing a black shirt and black jeans shorts laying [sic] on his back in a pool of blood with what appeared to be gunshot wounds to the head[.] [T]he victim was unresponsive and

not breathing. Paramedics [pro]nounced the victim deceased at 0216 [h]rs.

Det. Hampel discovered keys on the victim[']s body that belonged to Widener University[.] Upon checking with Widener Security it was found that the victim may have been a [W]idener student[.] [A] picture was given to police by Widener Security and was compared to the victim that was discovered on the 1000 blk of East 18th Street, and found [sic] that the victim and the picture provided to police were identical.

With the information provided[, p]olice believe that the victim is Abdul Sesay[,] B/M/20[,] who resides [sic] Widener University Campus at [T]hayer Hall Room # 306[.]

> FN1. The affidavit of probable cause set forth an incorrect investigation date, an error later described as caused by a hasty cut-and-paste procedure. Both the suppression court and the Superior Court determined that this technical mistake had no impact on the validity of the search warrant, a conclusion with which we do not disagree.

Pet. App. 3a-4a. The application for the search warrant sought "Any evidence that provides Identification/ Cellular Phones, Pagers, Drugs, Drug Paraphanalia [sic], handguns, bullets." Pet. App. 4a.

The police executed the search warrant and seized items in plain view, including the victim's cellular telephone, stained with the victim's blood, and items of the petitioner's clothing stained with the victim's blood. Pet. App. 5a.

Before trial, the petitioner moved to suppress the evidence seized with the search warrant. The trial court held a hearing and denied the motion. Pet. App. 7a.

After conviction and sentencing, on direct appeal, the Pennsylvania Superior Court reversed the trial court. The Superior Court concluded that "[b]ecause the affidavit gives no indication that contraband or evidence of a crime will be found in the victim's dorm room blocks away from the crime scene, it is not supported by probable cause." Pet. App. 57a. The Court stated that the warrant lacked probable cause because the police did not need to search for evidence of the victim's identity. Pet. App. 58a.

The Pennsylvania Supreme Court unanimously reversed. The Court concluded there was "no doubt" the warrant contained probable cause to search for evidence of the victim's identity, cellular telephones and pagers. Citing *Warden v. Hayden*, 387 U.S. 294 (1967), the Court determined that the identity of the victim and of those who might have contacted him on the night of his murder was evidence of a crime subject to seizure with a warrant. Pet. App. 15a-16a, 19a-20a. The Pennsylvania Supreme Court emphatically rejected the Superior Court's conclusion that

the police did not need to search for evidence of the victim's identity. Pet. App. 16a-17a, 20a.

ARGUMENT

A. This Court should decline to review the issue raised for the first time in this petition.

The question presented by the petition is a fact-bound determination of whether a search warrant affidavit contained probable cause. The body of the petition presents a different issue: the proper appellate standard of review of a magistrate's decision to approve a search warrant.

The petitioner asks this Court to *not* decide the question presented. Pet. App. 32. Rather, he asks the Court to (1) overrule *Illinois v. Gates*, 462 U.S. 213, 236 (1983); (2) mandate *de novo* review of a magistrate's decision to approve a search warrant; and (3) remand the case to the Pennsylvania Supreme Court. Pet. 16-24, 32.

This Court should deny the petition. The standard-of-review issue was not addressed by or presented to the Pennsylvania Supreme Court. Moreover, even if the petitioner preserved the standard-of-review issue, review is unwarranted because the result would be the same under *de novo* standard suggested by the petitioner.

1. The Pennsylvania Supreme Court did not decide the issue of the proper standard of review of a magistrate's decision to approve a search warrant.

This Court may review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any . . . right . . . is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States." 28 U.S.C. §1257(a). With very rare exceptions, this Court will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court. *Adams v. Robertson*, 520 U.S. 83, 86 (1997).

The Pennsylvania Supreme Court stated the standard of review but explicitly declined to further address it. Pet. App. 14a, n. 10. The Court noted that the "nomenclature" used to describe the amount of deference given to the magistrate's determination "is not pertinent to our disposition of the present appeal[,]" and asserted "we will not engage in any further discussion regarding this discrepancy in language or whether such discrepancy is reflective of any practical difference." *Id.* All of the members of the court joined the majority opinion. Pet. App. 22a, 24a, 30a.

Several justices reflected on the standard of review in concurring opinions. The petitioner claims this demonstrates "confusion" and "uncertainty" over the proper standard of review, warranting this

Court's intervention. Pet. 13-16. He is mistaken. The justices' observations are *dicta*.

Chief Justice Castille filed a concurring opinion joined by Justice Baer. He questioned the proper standard of review required by this Court under *Gates*, and offered "[his] own preliminary view" to "guide the bench and bar[.]" Pet. App. 24a-25a. The Chief Justice acknowledged this Court's precedent, questioned why *any* deference should be given to a magistrate's probable cause determination, and, consistent with *Gates*, concluded that deference is necessary to encourage police to obtain warrants. Pet. App. 26a-28a.

Justice Todd filed a concurring opinion joined by Justice Saylor. Justice Todd "offer[ed] . . . a few additional observations" on the proper standard of review. Pet. App. 31a. Justice Todd concluded that the "ordinary deference" standard applied by the Pennsylvania Supreme Court is consistent with this Court's *Gates* standard. Pet. App. 37a.

The justices acknowledged they were offering their personal views. Their speculation in concurring opinions about the ideal standard of review is *dicta*. Moreover, both concurring opinions acknowledge that the Court did not grant allowance of appeal on the question of the proper standard of review. Pet. App. 24a, 31a.

2. The petitioner did not raise the standard-of-review issue in state court.

The petitioner presents a detailed argument for why this Court's precedents and other authorities support a *de novo* standard for reviewing warrants. Pet. 16-24. In his brief in the Pennsylvania Supreme Court, however, the petitioner merely recited the *Gates* standard. It is therefore not surprising that the Court's opinion did not discuss it further.

The Pennsylvania Supreme Court requires a brief to include a statement of "both the scope of review and standard of review[.]" Pennsylvania Rule of Appellate Procedure ("Pa.R.A.P.") §2111(a)(3). The Commonwealth properly stated the *Gates* standard of review in its brief, in both the "Statement of Scope and Standard of Review" and "Argument" sections. Resp. Pa. Brief 3, 17-18.

In his brief, the petitioner did not include a "Counter-Statement of the Scope and Standard of Review." In the argument section, the petitioner agreed that the *Gates* standard of review applied. Pet. Pa. Brief 5, 9-10. The petitioner's failure to challenge the standard of review waived review of the issue by the Pennsylvania Supreme Court. Pa.R.A.P. §2112.

In the Pennsylvania Superior Court, the petitioner, who was the appellant, did not challenge the standard of review. Rather, he simply stated the *Gates* standard. Pet. Pa. Superior Ct. Brief, 18-20. In the trial court, the petitioner did not challenge the standard of review at the suppression hearing or in

his written motion to suppress. N.T. 1/28/04, 6-7, 137, 141; N.T. 5/7/04, 89-90.

When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Webb v. Webb*, 451 U.S. 493, 495 (1981) (internal citation omitted). The presentation requirement is jurisdictional. *See Howell v. Mississippi*, 543 U.S. 440, 445-46 (2005). Furthermore, this Court's rules require the petitioner to demonstrate that he properly raised the federal question by showing in the record where and how he raised it. Supreme Court Rule 14.1(g)(i). The petitioner did not meet this obligation because the record shows he did not present the issue below.

The novelty of the standard-of-review issue is also evident in his request that this Court *not* decide the question presented, but rather announce a standard of review more favorable to him and remand the case to the Pennsylvania Supreme Court. Pet. 16-24, 32. If he presented the issue below, the Pennsylvania Supreme Court would have addressed it, and remand would be unnecessary.

3. The issue raised in the petition is not "fairly included" in the question presented.

This Court will only consider the questions set out or "fairly included" in the petition for writ of

certiorari. Supreme Court Rule 14.1(a). The petitioner's standard-of-review issue may be *related* to the question presented – the existence of probable cause – but it is not "fairly included" therein. *See Wood v. Allen*, 130 S.Ct. 841, 851 (2010). Moreover, there is no reason to grant certiorari on a question presented when the petitioner asks this Court not to answer it. Pet. 32.

B. The Pennsylvania Supreme Court applied the proper, deferential standard of review.

A magistrate's probable cause determination should be given "great deference." *Illinois v. Gates*, 462 U.S. 213, 236 (1983). Therefore, a reviewing court is to determine whether the magistrate had a "substantial basis" to conclude the affidavit contained probable cause. *Id. De novo* review is "inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant" because it would discourage police from seeking warrants. *Id.* Deferential appellate review of warrants is well-settled. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996).

The Pennsylvania Supreme Court properly stated and applied the standard of review. It properly distinguished the plenary review of the trial court's decision to deny the motion to suppress from the deferential *Gates* review of the magistrate's decision to issue the warrant. Pet. App. 10a-14a.

C. Even applying the *de novo* standard of review suggested by the petitioner, the search warrant contained probable cause.

If the petitioner had properly preserved his claim, it would not warrant review because the standard of review would not change the result. Whether reviewed under a deferential or *de novo* standard, the warrant contains probable cause.

The affidavit reports that the police found the victim dead on the street, bleeding from gunshot wounds to the head. The victim had a key in his pocket from a nearby university. University security believed the victim was a student, and gave police a picture. It was a picture of the victim. Based on this information, the police concluded the victim was Abdul Sesay, who lived in Thayer Hall, Room 306. The police sought to search that room for evidence of the victim's identity, and for cellular phones and pagers. Pet. App. 3a-4a.

The Pennsylvania Supreme Court unanimously concluded there was "no doubt" the warrant contained probable cause to search for this evidence to confirm the identity of the victim and determine who contacted the victim on the night of his murder. The Court found "self-evident" the need for conclusive identification of the victim in the early stages of a murder investigation. Pet. App. 16a. This fact-bound, commonsense decision does not merit this Court's review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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